

BARNES, INC.,)	AGBCA No. 98-128-1
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Appellant)	
)	
Representing the Appellant:)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

November 23, 1998

OPINION BY ADMINISTRATIVE JUDGE HOWARD A. POLLACK

This appeal arises under Contract No. 50-0343-8-IP038, between the Forest Service (FS), U. S. Department of Agriculture, Idaho Panhandle National Forest and Barnes, Inc. (Barnes), of Lewiston, Idaho. The contract, in the amount of \$1,235,246.25 was awarded on September 15, 1988, and required widening approximately 6 miles of the existing St. Joe River Road.

Appellant claimed \$148,899.44, for costs of removing more material than it had been paid for. This appeal was docketed as AGBCA No. 95-146-1. Thereafter, the Appellant added an additional claim of \$206,967, which involved some of the same quantities as in AGBCA No. 95-146-1, but also addressed material from a location along the road, identified as Skookum Point. This second matter was docketed as AGBCA No. 96-155-1.

The parties settled these appeals and the Board dismissed them based upon the settlement agreement, Barnes, Inc., AGBCA Nos. 95-146-1, 96-155-1, unpublished decision (Sept. 18, 1996). Thereafter, a dispute arose between the parties over the terms of the settlement agreement. By Motion to

Enforce Agreement and for Entry of Judgment, dated November 20, 1996, Appellant asked the Board to issue an order compelling enforcement of the settlement agreement and for entry of judgment in its favor for \$95,136. Since the appeals had been dismissed, for purposes of processing the Motion, the Board redesignated the appeals as AGBCA Nos. 97-111-1 and 97-112-1, respectively.

On January 16, 1997, the FS filed its Memorandum in Opposition, as well as a Cross Motion to Reinstate the Original Appeals of AGBCA Nos. 95-146-1 and 96-155-1.

On September 9, 1997, the Board issued a Ruling, Barnes, Inc., AGBCA Nos. 97-111-1, 97-112-1, 97-2 BCA ¶ 29,237, (1) holding that it had jurisdiction to consider breach of the settlement agreement, (2) that it had no jurisdiction to grant specific performance nor to direct the FS or Appellant to engage in the fact-finding process, (3) that if the FS did commit breach the Board could award Appellant the \$95,136 independent of it ordering performance on the fact-finding, (4) that payment of the \$95,136 was conditioned on Appellant's compliance with the settlement agreement and, (5) if Appellant breached, Appellant's claim would be denied. The Board additionally pointed out that the parties had raised disputed questions of fact over breach and as such, summary judgment was not an appropriate vehicle for resolving the breach issues. Finally, the Board advised the parties that the breach claim over the settlement agreement was different than the previous claims and as such required Appellant to comply with the procedures of the Contract Disputes Act by requesting a Contracting Officer's (CO's) decision.

By a letter to the CO dated September 24, 1997, Appellant requested a final decision on its claim for payment of \$95,136 and for selection of a third-party surveyor in compliance with the settlement agreement. As of January 6, 1998, the CO had not issued a final decision and accordingly, Appellant filed a Notice of Appeal of that refusal with the Board. The matter was assigned docket number AGBCA No. 98-128-1.

On February 19, 1998, the Board held a telephone conference. The Board explained that if it found material breach on the part of the FS, that decision would carry with it a judgment of \$95,136 as agreed in the settlement. Such a decision on breach, however, would not include an order for specific performance as that was beyond the Board's authority. The Board noted that once a decision was made on breach, it would then expect to hear from the parties as to steps either party intended to take to close out the remaining matters, and should the parties not be able to come to an agreement, the Board would then have the parties brief the matter. Finally, the Board did note that based on information provided just prior to the scheduled hearing in August 1996, the Board had little confidence in either of the parties' quantities for Skookum Point and as such would expect, regardless of how the breach issue was decided, to have to hold an evidentiary hearing on the quantity issue.

On June 8, 1998, the Board received an executed Stipulation for Dismissal with prejudice under which the parties through counsel stipulated that AGBCA No. 98-128-1 had been completely settled and no further adjudication in resolving the dispute was necessary. The parties agreed and

stipulated that the entire matter be dismissed with prejudice. Additionally, the parties agreed “that no further claims, attorney fees and costs, and interest, shall be made with respect to Federal Contract Nos. 50-0343-8-IP038 or 50-0281-7-159, which were contracts associated in the Board’s matters captioned as AGBCA Nos. 98-128-1, 97-111-1, 97-112-1, 96-155-1, and 95-146-1.”

DECISION

The appeal is dismissed with prejudice pursuant to the settlement agreement.

HOWARD A. POLLACK
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D. C.
November 23, 1998